UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TOWN OF OYSTER BAY,

Plaintiff,

-against-

NORTHROP GRUMMAN SYTEMS CORPORATION (*f/k/a* Northrop Grumman Corporation), THE UNITED STATES NAVY and THE UNITED STATES OF AMERICA,

Defendants.

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Civil Action No.:
05-CV-1945 (TCP) (AKT)

Hon. Thomas C. Platt

PLAINTIFF'S MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

STATEMENT OF ARGUMENT

As the Second Circuit made clear in *Niagara Mohawk v. Chevron U.S.A., Inc.*, all that is needed is to establish compliance with the National Contingency Plan ("NCP") for purposes of proving a prima facie case under CERCLA is to conduct a response under the monitoring, and with the *ultimate approval*, of the state's environmental agency. *Niagara Mohawk v. Chevron U.S.A., Inc.*, 596 F.3d 112, 137 (2d Cir. 2010). In an effort to avoid the impact of the Second Circuit's broad pronouncement, the opposition briefs filed by defendants Northrop Grumman System Corporation ("NGSC"), the United States of America and the United States Navy (collectively, the "Federal Defendants"), to the Town of Oyster Bay's (the "Town") Motion for Reconsideration are premised almost exclusively on the oft-repeated, glaring factual misrepresentations that both defendants have been relying upon from the early stages of this litigation – that the New York State Department of Environmental Conservation ("DEC") did not provide approval for the Town to implement Remedial Alternative IV at the Park Property and that the DEC's commentary by the regarding its views on the level of effort being put forth by the Town in remediating the Park Property somehow negates the DEC's formal approval of the Town's selection of Remedial Alternative IV ("RA IV") at the Park Property.

Indeed, the defendants' arguments are a clear misrepresentation of the facts in this matter and contradict the clear evidence submitted by all parties in their respective Motions for Summary Judgment which demonstrates that, by letter dated May 4, 2006, the DEC *did*, in fact, issue a formal approval of RA IV. Thus, because this Court's May 14, 2009 dismissal of the Town's CERCLA claims were based solely on the conclusion that the Town was affirmatively required to and did not demonstrate substantial compliance with the NCP as a matter of law, the Second Circuit's intervening decision in *Niagara Mohawk*, which clearly holds that a party's compliance with the NCP is established by conducting a response under the DEC's monitoring and ultimate approval, requires that the instant motion be granted in its entirety.

Moreover, the remaining arguments put forth by defendants in their respective oppositions concerning the so-called "other grounds" the Court purportedly relied upon in dismissing the Town's CERCLA claims are equally unavailing. Indeed, the Court's dismissal was based solely on its findings that the Town did not demonstrate compliance with several aspects of the NCP. Accordingly, because the Second Circuit's decision in *Niagara Mohawk* clearly demonstrates that its holding extends to each and every component of the NCP, defendants' arguments in this regard must also be rejected.

I. THE TIME LIMITS CONTAINED IN LOCAL RULE 6.3 ARE NOT APPLICABLE TO THIS SITUATION

Defendants' reliance upon the 14-day time limitation contained in Local Civil Rule 6.3[1] for filing a motion for reconsideration conveniently ignores the numerous decisions which hold that the court retains discretion to consider a motion for reargument, notwithstanding the movant's failure to comply with Local Rule [6.3]'s requirements when justice so requires. *Church of Scientology Int'l. v. Time Warner, Inc.*, No. 92-CV-3024, 1997 U.S. Dist. LEXIS 12839, at *13-14 (S.D.N.Y. Aug. 27, 1007). Indeed, several cases have held that "justice *requires* the exercise of this discretion when, for example, there is an intervening change in controlling law." *Clinton v. Brown & Williamson Holdings, Inc.*, 652 F. Supp. 2d 528, 530 (S.D.N.Y. 2009) (*emphasis added*); *Filler v. Hanvit Bank*, No. 01-CV-9501; 2003 U.S. Dist.

[1] In a footnote contained in their Memorandum of Law In Opposition to this Motion, the Federal Defendants object to the Declaration submitted by Janice McGuckin-Greenberg in support of the Town's motion pursuant to Local Civil Rule 6.3. Ms. Greenberg's Declaration merely attached a copy of the March 30, 2010 Decision and Order of the United States District Court for the Northern District of New York, in the *Niagara Mohawk* matter, which forms the basis of the instant motion, for this Court's convenience. The Court is free to access the March 30, 2010 Decision and Order in that matter via the Electronic Filing System for the United States District Court for the Northern District of New York if the Court chooses to disregard Ms. Greenberg's Declaration and the attached exhibit.

LEXIS 12836, at *2 (S.D.N.Y. July 23, 2003); *Richman v. W.L. Gore & Assocs.*, 988 F. Supp. 753, 759 (S.D.N.Y. 1997).

Here, defendants fail to explain (because they cannot) how the Town could logically and realistically be expected to comply with Local Civil Rule 6.3 when the intervening change in law took place well after the 14-day time limitation set forth in that rule. Moreover, defendants speculate that the Town improperly waited to bring the instant motion several months after the Second Circuit issued its decision in *Niagara Mohawk* without any basis for making such a presumption. Indeed, defendants are unable to point to any fact that demonstrates the Town did anything other than properly serve this motion shortly after it learned of and had the opportunity to analyze the Second Circuit's decision in *Niagara Mohawk* and how it applied to this Court's dismissal of the Town's claims. Accordingly, Defendants' improper and speculative suggestion that the Town should and could have served the instant motion cannot serve as a basis for this Court to disregard the exercise of discretion that is required in the interests of justice in this matter.

II. NGSC'S RELIANCE UPON COMMENTS BY THE DEC DOES NOT CHANGE THE FACT THAT THE DEC "ULTIMATELY APPROVED" OF RA IV, WHICH IS ALL THE SECOND CIRCUIT REQUIRED IN *NIAGARA MOHAWK*

In an effort to avoid the impact of the Second Circuit's broad pronouncement in *Niagara Mohawk*, defendants stubbornly and incorrectly claim that the DEC did not approve the Town's implementation of RA IV. Rather, defendants, as they always have, focus upon commentary made by the DEC concerning the magnitude of the work the Town sought to undertake and attempt to pass that dicta off as the DEC's "disapproval" of the Town's remedial plan. However, as this Court noted in its May 14th Memorandum and Order ("May 14th Order"), the DEC did, in fact, approve RA IV in its May 4, 2006 letter, which provided "[a]ccordingly the NYSDEC *will* *approve the remedial alternative [Remedial Alternative 4]*, as it is protective of public health and the environment." (*emphasis added*). May 14th Order at p. 9; May 14th Order at p. 56. Thus, under *Niagara Mohawk*, that is all that is needed to establish consistency with the NCP.

Tellingly, defendants never reference in any of the filings submitted in this matter to the fact that the DEC expressly granted its approval for the Town to implement RA IV in the May 4, 2006 letter. Rather, in a transparent attempt to distinguish the Town's claims from the *Niagara Mohawk* case, defendants resort to their prior practices of cherry picking select commentary and observations that the DEC made concerning the level of work the Town sought to implement at the Park Property, despite the fact that the DEC *expressly approved* the Town's remedial plan, and mischaracterizes those comments as an official "disapproval".

As discussed in the Town's Brief in Support of the instant motion, the Second Circuit, in *Niagara Mohawk*, held that "[o]ne way of establishing compliance with the [NCP] is to conduct a response under the monitoring, and with *the ultimate approval*, of the state's environmental agency." *Niagara Mohawk*, 596 F.3d. at 137, *citing NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 791 (7th Cir. 2000) (*emphasis added*). No amount of alchemy or gerrymandering of the DEC's comments by defendants can refute the simple, yet crucial fact that, on May 4, 2006, the DEC *ultimately approved* RA IV to be implemented at the Park Property and that the Town conducted its remedial activities pursuant to that approval and under the supervision of the DEC. Accordingly, defendants' arguments to this end are meritless and have no bearing on the Second Circuit's broad pronouncement concerning NCP compliance in establishing a prima facie case under CERCLA.

In another attempt to distinguish *Niagara Mohawk*, NGSC relies upon blatant misrepresentations concerning not only the facts of this matter but, also, the Second Circuit's holding in that matter. Specifically, NGSC incorrectly claims that DEC "silently acquiesced" to the Town's implementation of RA IV despite the clear fact that the DEC formally approved that plan (NGSC Brief at p. 3). Moreover, NGSC suggests that the Second Circuit's holding in *Niagara Mohawk* only allows a "rebuttable presumption" of consistency with the NCP which, upon even a cursory reading of the decision, is clearly not the case. Indeed, nowhere in the *Niagara Mohawk* opinion is there any suggestion that a state agency's approval of a private party's response actions only bestows a "rebuttable presumption" of consistency. Rather, the Second Circuit broadly and clearly stated that the state agency's approval is the *only* thing that is needed to demonstrate compliance with the NCP.

III. THE "OTHER GROUNDS" CITED BY DEFENDANTS FOR THIS COURT'S DISMISSAL OF PLAINTIFFS' CERCLA CLAIMS ARE ELEMENTS OF THE NCP AND, THEREFORE, FALL WITHIN THE PURVIEW OF *NIAGARA MOHAWK*

Defendants also oppose the Town's motion based on their claim that there were "other grounds" for this Court's May 14, 2009 decision dismissing the Town's CERCLA claims. This argument is both factually and legally incorrect for a number of reasons.

First, the May 14th Order specifically states that the dismissal of the Town's CERCLA claims was based *solely* upon the Court's finding that the Town did not substantially comply with the NCP:

> NGSC's and the federal defendants' motions for summary judgment against plaintiff are granted due to plaintiffs' failure to substantially comply with the NCP's requirements that a private party select a cost-effective remedy, evaluate alternative remedies, reevaluate alternative remedies after the public comment period has ended and for plaintiff's failure to adequately document its costs and demonstrate that said costs were necessary. Plaintiff's motions for summary judgment against NGSC and the federal defendants are denied for failure to establish a *prima facie* case by demonstrating that it substantially complied with the NCP's cost-effectiveness requirement, that it failed to evaluate alternative

> remedies both before and after the public comment period and for failure to document its costs and demonstrate that same were necessary.

(May 14th Order, pp. 46-47).

> ...the Court finds that the Town did not substantially comply with NCP requirements. Accordingly, plaintiff's motions for summary judgment against defendants on its CERCLA claims must be and hereby are denied. NGSC and the federal defendants' motions for summary judgment against plaintiffs' on its CERCLA claims are hereby dismissed.

(May 14th Order, p. 60-61).

As is evident from the above, each of the bases this Court set forth in its decision dismissing the Town's CERCLA claims are part and parcel of the NCP statute and, contrary to defendants' arguments, do not serve as an independent basis for dismissal under *Niagara Mohawk*, which holds that the DEC's ultimate approval of RA IV demonstrates compliance with the NCP as a whole.

The applicable section of the NCP with respect to private party response actions states that "[a] private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (5) and (6) of this section, and results in a CERCLA-quality cleanup."[2] 40 C.F.R. § 300.700(c)(3)(i).

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[2] The applicable sections of the NCP, as set forth in 40 C.F.R. §300.700(c)(5)-(6), provide as follows:

> (5) The following provisions of this part are potentially applicable to private party response actions:
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> (i) Section 300.150 (on worker health and safety);
> (ii) Section 300.160 (on documentation and cost recovery);
> (iii) Section 300.400(g) (on identification of applicable or relevant and appropriate requirements ("ARARs"));
> (v) Section 300.410 (on removal site evaluation) except paragraphs (f)(5) and (6);

As discussed in the Federal Defendants' Memorandum of Law in Opposition to Plaintiff's Second Motion for Reconsideration ("Federal Defendants' Brief"), the Federal Defendants state that "...this Court correctly determined that, based on undisputed facts, Plaintiff had failed to comply with several requirements of the NCP" (Federal Defendants' Brief at p. 6). The Federal Defendants go on to state that "...the Court correctly found the following additional reasons that Plaintiff's costs were unrecoverable" and list the reasons as "plaintiff failed to evaluate alternative remedies after public comment" and "plaintiff failed to adequately document its costs" (Federal Defendants' Brief at pp. 7-8). Indeed, in the May 14th Order, this Court specifically held that the Town failed to demonstrate that RA IV was "cost effective" (May 14th Order at pp. 54-57); failed to consider alternative remedies (May 14th Order at p. 57-59); failed to undertake public comment and evaluate alterative remedies (May 14th Order at p. 59); and failed to adequately document the costs it incurred in connection with implementing RA IV. (May 14th Order at pp. 59-60). As is evident from the applicable section of the NCP, each of these purported failures by the Town are provisions of the NCP itself and are not, contrary to the defendants' statements, reasons *in addition to and independent from* the NCP.

(vi) Section 300.415 (on removal actions) except paragraphs (b)(2)(vii), (b)(5), and (g); and including § 300.415(j) with regard to meeting ARARs where practicable except that private party removal actions must always comply with the requirements of applicable law;

(vii) Section 300.420 (on remedial site evaluation);

(viii) Section 300.430 (on Remedial Investigation/Feasibility Study ("RI/FS") and selection of remedy) except paragraph (f)(1)(ii)(C)(6) and that applicable requirements of federal or state law may not be waived by a private party; and

(ix) Section 300.435 (on Remedial Design/Remedial Action ("RD/RA") and operation and maintenance).

(6) Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on the provisions set out below, or based on substantially equivalent state and local requirements...

The breadth of the Second Circuit's holding in *Niagara Mohawk* with respect to each and every component of the NCP is illustrated in the Second Circuit's decision itself and also in this Court's May 14th Order. Specifically, in *Niagara Mohawk*, the Second Circuit noted that it had "never squarely addressed whether compliance with a state consent decree is sufficient to prove adherence to the National Contingency Plan." *Niagara Mohawk*, 596 F.3d at 136. This Court made a similar observation in its May 14th Order, which distinguished the prior decisions by the Second Circuit concerning NCP compliance. Specifically, this Court noted that the prior decisions by the Second Circuit and other courts within the Second Circuit (i.e., *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998); *Benderson Development Co., Inc. v. Neumade Products Corp.*, 2005 WL 1397013 (W.D.N.Y. June 13, 2005)) were limited to situations where a party sought to demonstrate compliance with the public participation and notice requirement of the NCP based upon the DEC's involvement in the investigatory and remedial process. (May 14th Order at pp. 52-53.) However, unlike its prior decisions in *Bedford Affiliates*, the Second Circuit, in the *Niagara Mohawk* decision, did not limit its holding to one or more aspects of the NCP. Rather, the Second Circuit broadly held that all that is needed is to establish compliance with the NCP as a whole is to conduct a response under the monitoring, and with the ultimate approval of the state's environmental agency. *Niagara Mohawk v. Chevron U.S.A., Inc.*, 596 F.3d 112, 137 (2d Cir. 2010). As such, because the "other grounds" cited by defendants are, in fact, elements of the NCP and not separate and independent inquiries, the Second Circuit's holding in *Niagara Mohawk* is controlling and the Town, by virtue of implementing a DEC approved and monitored remedy, has established compliance with each and every aspect of the NCP.

CONCLUSION

For these reasons, as well as the reasons set forth in the Town's Memorandum of Law submitted in support of this Motion, the Town respectfully requests that this Court grant the relief sought in the Town's Motion For Reconsideration.

Dated: Uniondale, New York
January 28, 2011

Respectfully submitted,

RIVKIN RADLER LLP
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CERTIFICATE OF SERVICE

It is hereby certified that on this 28th day of January, 2011, the foregoing Plaintiff Town of Oyster Bay's Memorandum Of Law In Reply To Defendants' Opposition To Plaintiff's Motion For Reconsideration were served upon the following individuals via electronic mail and the Court's Electronic Filing System:

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